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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 92M-505
02642

APR 30 8 00 AM '92

In re Application of)	MM DOCKET NO. 92-6
)	
NORMANDY BROADCASTING CORP.)	File No. BRH-910129UR
)	
For Renewal of License of)	
Station WYLR(FM))	
Glens Falls, New York)	
)	
and)	
)	
LAWRENCE N. BRANDT)	File No. BPH-910430MB
)	
For a Construction Permit)	
for a New FM Station on 95.9 MHz)	
at Glens Falls, New York)	

MEMORANDUM OPINION AND ORDER

Issued: April 28, 1992;

Released: April 29, 1992

Background

1. This is a ruling on a portion of the Petition To Modify And Enlarge Issues that was filed on February 24, 1992, by Lawrence N. Brandt ("Brandt").¹ The Bureau opposed the adding of the issue in its Comments filed on March 10, 1992. Brandt filed a Reply To Mass Media Bureau Comments on March 19, 1992. Brandt also filed a Supplement to its Petition To Enlarge Issues on March 30, 1992.²

2. An Opposition was filed on April 13, 1992, by the renewal applicant Normandy Broadcasting Corp. ("Normandy"). On April 14, 1992, the Bureau filed additional Comments in response to Brandt's Supplement. On April 17, 1992, Brandt filed a Reply to the Bureau's Comments and on April 21, 1992, Brandt filed a Reply to the Bureau's second Comments.

1 Part of the relief sought by Brandt was granted earlier with respect to a modification of the Hearing Designation Order. See Order FCC 92M-381, released March 26, 1992.

2 There was an enlarged pleading cycle prescribed at the prehearing conference of March 24, 1992, reduced to writing in Order FCC 92M-381, supra. Although it was contemplated that this ruling would be deferred pending a ruling on Brandt's pending Motion For Summary Decision, since the pleading cycle is complete the ruling will be made at this time. The Opposition of Normandy to the Motion For Summary Decision was set for May 5, 1992. Id.

Facts

3. Brandt seeks an issue against Normandy:

To determine whether Normandy misrepresented facts to the Commission when it certified in its renewal application that it had placed in WYLR's public file, at the appropriate times, the information required by Section 73.3526 of the Commission's rules.

Brandt is asserting that Normandy had failed to place on public file its quarterly programs/issues lists during its license term. In support of its request to add the issue, Brandt submitted copies of WYLR's lists from 1987 through the first quarter of 1990. The Bureau opposes adding the issue.

4. Brandt later submitted in a Supplement a declaration of Sherrae J. Frasier ("Frasier") stating that she had obtained the lists from Normandy's office on June 22, 1990.³ Frasier avers that she had obtained all of Normandy's lists that were on file during the period in question. Brandt also submitted with its Supplement a declaration of Normandy's principal, Christopher Lynch ("Lynch"). Brandt contends that the Lynch declaration supports a conclusion that the lists obtained by Frasier constituted all of the lists that were in existence on June 22, 1990.

5. The Bureau disagrees. The Bureau takes the position that Lynch appears to suggest that the lists obtained by Frasier constituted only "some" of the lists. (See Bureau Comments of April 14, 1992, at 2, Paras. 3-4 n. 2.) In addition, the Bureau has offered documentary proof that Normandy certified "No" in response to the question of whether it had complied with §73.3526. In a document marked Exhibit 4 that was keyed to Normandy's "No" response, Normandy disclosed that "one of these reports were missing" and that "a few quarterly lists seemed to inadequately reflect our efforts." (Id.)

6. Normandy has filed an Opposition through which it also submits a copy of its "No" certification and Exhibit 4, as well as a declaration of Francis C. Shoupe, Jr. ("Shoupe") dated August 3, 1990, and a declaration of Bette E. Trombley ("Trombley") dated August 3, 1990. Shoupe was Normandy's chief engineer. Shoupe stated that he was president when a receptionist had provided copies of public file documents to Frasier and that Frasier was advised that there were more materials but that Frasier stated that she did not want additional documents. Trombley was Normandy's chief bookkeeper. Trombley essentially confirmed Shoupe's account that Frasier had declined to take additional materials that were offered to her by Normandy's receptionist.

3 Brandt had failed to file an affidavit or declaration with his original petition. Brandt also had failed to request official notice. The Bureau correctly noted that Brandt had failed to conform its papers to the requirements of §1.229.

7. Normandy also offers an explanation as to why quarterly lists were not in its public file. Normandy was being considered for an NAB Crystal award for public service broadcasting and, in connection with documenting eligibility, Normandy may have pulled quarterly reports from its public file. Normandy also hypothesizes that its public files were not secured at the time and that therefore some files may have been taken to competitors by departing WYLR employees. Now, according to Lynch, the public files are locked so that employees would not have ready access.

8. Brandt replies that according to a declaration of Frasier dated August 16, 1990, she was told by Normandy's receptionist that the awards file was maintained separate from the quarterly reports and public issues list. Brandt does not deny that WYLR may have aired as many as 31 programs that were responsive to community issues and problems over the course of the license term. Brandt argues that WYLR's actual broadcast record is irrelevant to Normandy's representation to the Commission that it had placed all but one list on the public file which, according to Brandt, is false.

Discussion

9. The Commission requires strict conformance with Section 1.229 which would include the requirement for affidavits based on personal knowledge or official notice. 47 C.F.R. §1.229(d). Allegations must be based on specific allegations of fact. Id. The Commission's standard of strict compliance with §1.229 includes a requirement that only evidence that is new that could not reasonably have been discovered earlier can be relied upon to add new postdesignation issues. Greats Lakes Broadcasting, Inc., 6 F.C.C. Rcd 4331, 4332 (Comm'n 1991).

10. The Bureau correctly notes that in his Petition of February 24, 1992, Brandt submitted no affidavits or declarations. Neither did he seek official notice. Thus Brandt did not technically comply with §1.229 in the first instance. Also, since Normandy had certified "No" to full compliance, the evidence could have been considered by the Bureau when it issued the designation order and, in that sense, the evidence is not newly discovered. Therefore, there must be sufficiently demonstrated assertions of misrepresentation or a lack of candor in order to require adding the issue. Cf. Joseph Bahr, 7 F.C.C. Rcd 2147 (Review Bd, March 31, 1992) (claim that applicant did not own property needed for financial certification presented substantial public interest question of applicant's candor requiring an issue). There the Review Board applied the public interest test as including a preliminary finding that the likelihood of proving the allegations is so substantial as to outweigh the benefit of an orderly disposition of the litigation. Id. at Para. 11. For reasons stated below, Brandt has failed to meet that high standard for adding the issue because there is not a substantial likelihood that under these facts Brandt can prove that Lynch misrepresented or lacked candor. However, the parties are now placed on notice that if Normandy is later permitted to offer mitigating evidence to offset a possible finding of disqualification under the present designation

order, as modified, Brandt may seek to introduce all or parts of the evidence in rebuttal upon a proper showing.⁴

11. The crux of the misrepresentation/candor issue is whether Normandy was being truthful and forthright when it offered its explanation in Exhibit 4 that only "one of those reports was missing." Brandt presents credible evidence through an eye witness that quarterly reports were incomplete during the period January 1987 to June 1990. Brandt seeks to offer evidence tending to show that during seven of the quarters in that period of time, Normandy did not place in WYLR's public file a list of programs that provided the station's most significant treatment of community issues during the preceding three months period. 47 C.F.R. §73.3526(a)(9).

12. Consider the evidence. In one quarter, it appears that no list was filed. But that fact was admitted by Normandy in its Exhibit 4 filing where Normandy states that "one of these reports was missing." Normandy also disclosed that a "few lists" reflected inadequate disclosure. While the admission about a "few lists" may be arguably misleading, when all of the facts are presented it is just as likely that they would support a finding of no more than inadequate disclosure through negligence or carelessness. For disqualification based on Normandy's filing of Exhibit 4, which is in the nature of an affidavit, the Commission has required an "intentional misrepresentation" taking into account the "willfulness of the misconduct, the frequency of such behaviour, - - - the seriousness of the misconduct - - - [and] the applicant's record of compliance with our rules and policies, if any." Professional Radio, Inc., 2 F.C.C. Rcd 6666 (Comm'n 1987). It is highly significant here that Normandy had checked "No" to the question of whether it had at all appropriate times complied with the reporting requirements under §73.3526. The "No" certification was a "red flag" that put the Commission and the public on timely notice in its renewal application that there was non-compliance. The Commission had an opportunity to assess its significance at the predesignation stages of Normandy's renewal application and, if found appropriate, to set the issue in the designation order. But the designation order was issued without the issue and there has not been a sufficient showing to add it postdesignation.

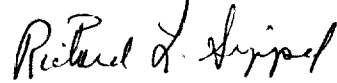
13. The failure to show a substantial likelihood of proving the allegation of misrepresentation or absence of candor under the circumstances alleged by Brandt requires the denial of the issue. However, as indicated above, some or all of the evidence may be sought to be used by Brandt and/or by the Bureau in rebuttal.

⁴ The Presiding Judge will require a specific showing of relevance and substantiality for each item of evidence marked as an exhibit and offered in rebuttal by Brandt.

Ruling

Accordingly, IT IS ORDERED that the Petition To Modify And Enlarge Issues filed on February 24, 1992, by Lawrence N. Brandt insofar as it seeks a misrepresentation issue under §73.3526 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Richard L. Sippel". The signature is written in a cursive, flowing style.

Richard L. Sippel
Administrative Law Judge